CASE NOS. 17-1238 & 18-1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Agency Decision in 08–CA–11943 and 08–CA–119535
Reported at 365 No. 158)

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.
Petitioner/Cross Respondent

vs.

THE NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

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SUMMARY OF ARGUMENT

Nothing in the National Labor Relations Board's (the "Board"), Brief sufficiently rebuts the overwhelming record evidence cited by Petitioner, Midwest Terminals of Toledo International, Inc. ("Midwest" or Company") that the totality of the record evidence establishes that the Board's rulings, findings and conclusions are irrational, arbitrary, and not substantially supported by the record evidence.

1. § 8(a)(3) and (1) & 8(a)(4) and (1) violations related to Otis Brown (8-CA-119493)

The Board failed to give adequate consideration to Midwest's *Wright Line* defenses, and the finding that Midwest's reason for terminating Brown was pretextual is not supported by substantial evidence. Midwest put forth substantial evidence establishing that its reason for terminating Brown (equipment damage) was not pretextual. The record evidence (continually ignored) by the Board established that Midwest consistently and evenly applied its disciplinary rules with respect to Brown's termination related to property/equipment damage.

Only two employees have been terminated for property/equipment damage; Joe Victorian Sr. and Brown. Joe Victorian, Sr. was terminated after his third transgression in an approximate 19 ½ month period from January 24, 2012 thru September 9, 2013. Brown was terminated after his third transgression in an approximate 13 ½ month period. In its Decision, the Board failed to consider,

without explanation, Brown's two previous transgressions. Accordingly, no deference is warranted to the Board's findings and conclusions.

2. § 8(a)(1) and (5) violations regarding aluminum (8-CA-119493)

The proviso set forth in the Board's April 30, 2013 Decision and Determination of Jurisdictional Dispute (JA 979-980) expressly allows the Teamsters to enter the wet side of the facility in order to transport cargo that is to be stored on the dry side. Midwest desired to rid itself of the use of transfer trucks (when possible) in order to be more labor and cost efficient. There is no reason to load and unload a transport truck when such work unnecessary. This testimony was elicited during the 10(k) hearing. Accordingly, permitting the Teamsters to drive a transfer truck onto the water side of the facility, instead of a third party contractor is not a rational reading of the proviso. Under this scenario, unnecessary work (the loading and unloading of a transfer truck) is still being needlessly performed.

The ALJ was not interested in hearing this evidence or allowing the record to be introduced, despite the fact that Midwest made numerous objections during the Hearing. Moreover, the Board's legal counsel responsible for briefing the matter before this Court has no knowledge of the record evidence from the 10(k) hearing because they were not a part of the proceeding, nor is the record evidence a part of this case. They are simply formulating an argument over five and one-half

years removed from the jurisdictional dispute hearing, without the benefit of having reviewed the record because the ALJ and the Board prohibited the introduction of the record evidence to be submitted into the record herein.

3. § 8(a)(1) and (5) violations regarding calcium (8-CA-119493)

This is not an allegation regarding an alleged unlawful unilateral elimination of ILA Local 1982's (the "union") work. Rather, it is an impermissible attack on Midwest's business operations as to where Midwest can store the cargo in and about its facility. There is no dispute that the parties do not bargain over *where* cargo is to be stored. There is also no dispute that product is stored on both the wet side and the dry side of the facility. Generally speaking, the union loads, unloads and moves cargo about the facility on the wet side, while the same holds true for the Teamsters on the dry side.

Midwest, and Midwest alone, determines where cargo is to be stored based upon where there is requisite space available at the facility and customer demands for inside versus outside storage. Midwest followed those parameters and determined that the calcium should be stored in a warehouse on the dry side. The record evidence established that calcium used to be stored in the "A-Shed" warehouse, the biggest warehouse on the water side. However, "A-Shed" was torn down in 2013. Notwithstanding, the Board maintains that Midwest's actions unilaterally eliminated the union's "loading work." (Brief, p. 41.) However, the

union loaded the transfer trucks that transported the calcium to the wet side of the facility.

Lastly, the Board's 10(k) decision is unquestionably *not* limited to aluminum. The work in dispute is the "loading, unloading, and movement of cargo and materials" at Midwest's facility. (JA 976) Further, the dispute was not where the cargo is to be stored, but who performs the work based upon where it is stored. Accordingly, Midwest is unclear as how the Board interprets Midwest's argument as "confusing." (Brief, p. 41-42, FN 10) Transfer trucks were used to transport the bagged cargo (because forklifts can puncture the bags) and the union loaded the transfer trucks. Thus, Midwest was in compliance with the Board's interpretation of the 10(k) decision. Nonetheless, the Board maintains that the Midwest violated that Act because the 10(k) dispute only concerns aluminum. However, as explicitly noted above, its argument is at best, hopelessly inaccurate and at worst, completely disingenuous.

4. § 8(a)(1) and 8(a)(3) and (1) and 8(a)(4) and (1) allegations related to Prentis Hubbard (8-CA-119535)

Midwest did not waive its defenses related to these allegations.

ARGUMENT

I. MIDWEST'S PETITION FOR REVIEW SHOULD BE GRANTED AND THE BOARD'S CROSS APPLICATION FOR ENFORCEMENT SHOULD BE DENIED BECAUSE THE BOARD'S ORDER IS IRRATIONAL, ARBITRARY AND NOT SUBSTANTIALLY SUPPORTED BY THE RECORD EVIDENCE

A. Midwest Lawfully Terminated Brown

Midwest terminated Brown because he caused extensive and extraordinary damage to an end loader he was operating during the shift in question.

1. Groweg's findings

Robert Groweg, the technician who inspected and repaired the end loader had 23 years of experience and had undergone extensive training, including training on the make and model of the end loader in question. His initial report determined as follows:

> 09/20/13
> Drove to jobsite. Checked out brakes on loader. Found final drives were pretty hot. Checked temp of final drive covers and rear axle was about 150 degrees and front axle was 110 degrees after setting [sic] 4 to 5 hours. Looked at wheel seals left rear is leaking already. Checked accumulators and the pressures [sic] little low but not enough to be a problem. Brakes and seals are going to need replaced. Problem was do [sic] to operator not using machine properly.

(JA 1135). A summary of Groweg's testimony related to his initial report is as follows:

- Upon arrival he performed a walk around of the end loader and immediately recognized the discoloration of the wheel hubs. (JA 517)
- Discolored wheel hubs result from an extreme amount of heat which is not a normal occurrence. (Id.) The wheel hubs were so hot that the paint on the wheel hubs was actually discolored. (Id.)

- After concluding his walk around, Groweg climbed up into the end loader and checked the brake pedal to make sure it was all the way released; it was. (JA 518)
- Groweg started the end loader to see how the brakes would react. The brakes squealed loudly and there was considerable vibration. (JA 519)
- The rear axle was still 150 degrees when Groweg arrived some four to five hours after the loader had been out of operation and the front axle was still 110 degrees. (JA 522, 1135)
- The wheel seals were already leaking when he arrived and after he tested the brakes the wheel seals began leaking profusely; an abnormality. (JA 520-521, 556, 559-560)
- The wheel seals must be under extreme heat to cause such leaking. (JA 521, 560-561) The leak could not have started days before because the inside of the tire was dry. (JA 557) Groweg has never worked on an end loader at Midwest that sustained this type of damage and was hot enough to discolor the paint on the wheel hubs; especially given the fact that the brake pedal was free from dirt and grime. (JA 562)
- Based upon all of the above, Groweg concluded that there was nothing mechanically wrong with the end loader. (JA 523) Thus, he determined that

the damage was caused by the operator not using the machine properly. (JA 522-523)

- The damage described in his report cannot be considered normal wear and tear and replacing the breaks is not routine maintenance. (JA 522).

2. Midwest's good faith belief that Brown damaged the end loader was reasonable

The record evidence plainly establishes that Leach reasonably relied upon Groweg's initial report (JA 1135) and his own experience[1] regarding the proper operation of an end loader and terminated Brown because of the extensive and extraordinary damage he caused to end loader. More importantly, Leach would have terminated Brown even absent Brown's protected activity. As such, the Board's finding of pretext and disparate treatment towards Brown is not substantially supported by the record evidence. When reviewing the record for substantial evidence, this Court must "take account of anything in the record that *'fairly detracts' from the weight of the evidence supporting the Board's conclusion.*" See, *General Electric Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997) (Emphasis added.) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[1] Leach was certified as an end loader operator by the Ohio Department of Transportation. (2SA 3-4)

a. good faith belief defense.

Leach reasonably believed in good faith, that Brown caused the damage to the end loader, be it intentionally or unintentionally, based upon his own inspection of the end loader, his own experience in operating end loaders and the findings in Groweg's initial report. The *Wright Line* analysis inquires not what an employee did, but what the employer in good faith believed the employee did. See, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016). In other words, whether the disciplinary action was warranted hinges on what the employer "believed, whether [the] beliefs were reasonable, and whether [its] actions based on those beliefs were consistent with its policies and past practice." Id., citing, *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 436 (D.C. Cir. 2012). Further, past practice evidence is relevant to the first *Wright Line* inquiry into anti-union animus and the lack of disparate treatment is a factor to be weighed against the General Counsel's record evidence.. See, *Meco Corp. v. NLRB*, 986 F.2d 1434, 1438 (D.C. Cir. 1993).

The record evidence unquestionably establishes that the discipline issued to Brown is consistent with that which Midwest would have normally issued when confronted with similar employee conduct that Leach reasonably believed had occurred. Excluding Brown, only one other employee had been terminated due to property or equipment damage. Joe Victorian, Sr. was terminated in September

2013 after running a forklift into and severely damaging a main support beam of the A1 Warehouse, his third transgression in approximately 19 ½ months. (JA 1246 & 1336) Victorian, Sr. received two earlier transgressions, a written warning and suspension in June 2012 for causing nearly $50,000 in damage to an end loader (JA 1334), and a verbal counseling on January 24, 2012 for damaging a gas line with an end loader (JA 1321).

Brown was terminated in October 2013 for causing significant damage to an end loader, his third transgression in approximately 13 ½ months. (JA 1045) In August 2012, Midwest issued Brown a written reprimand for damaging communication line with an end loader. (JA 703, 908) Also, in August 2012. Midwest issued a written reprimand to Brown for running through the A-1 warehouse wall with a forklift. Midwest warned Brown that any further occurrences could result in equipment disqualification, suspension or termination. (JA 703-704, 910)

Similar to the other employees, and in direct conflict with the ALJ's findings and conclusions, Brown too received discipline short of termination for his earlier transgressions. Accordingly, Midwest met its *Wright Line* burden. *See, General Die Casters, Inc.,* 2011 NLRB LEXIS 200, *156 (2011) citing *Septix Waste, Inc.* 346 NLRB 494, 495-496 (2006) (in order to meet *Wright Line,* an employer must

simply establish that it had consistently and evenly applied its disciplinary rules). See also, *Fort Dearborn Co.* at 1076.

b. Ozburn-Hessey Logistics, LLC v. NLRB is of little aid to the Board.

The Board incorrectly maintains that the good faith belief defense set forth in *Fort Dearborn Co*, is not applicable to Midwest based upon this Court's reasoning in *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210 (D.C. Cir. 2016). The Board's reasoning is misguided. In *Ozburn-Hessey*, this Court upheld the Board's determination that the employer's good faith belief that the terminated employees used racial slurs and fabricated witness statements was not reasonable based upon credibility determinations resolved in the employees favor. Id at 221-223. Further, this Court determined even if the employer reasonably believed the employees used racial slurs or fabricated witness statements, it nonetheless failed to establish that the employees in question received the same or similar discipline to other employees who had engaged in the same or similar behavior. Id.

Unlike *Ozburn-Hessey*, here, there is no dispute that end loader suffered extensive damage due to operator error (intentional or unintentional). Further, Groweg credibly testified that if the damage to the end loader had occurred on a shift previous to Brown, Brown would have noticed an immediate problem – loud squealing brakes and significant vibration in brakes when applying them. (JA 532-533) However, Brown conducted a pre-check inspection prior to his shift and

reported nothing to management prior to the start of his shift. According to Groweg, Brown should have been aware of the damage he was causing to the breaks. (JA 529-531)

c. Groweg's later findings do not invalidate Midwest's reasonable good faith belief defense.

The Board maintains that Midwest acted improperly by continuing to rely on Groweg's initial report rather than his later reports where he found "that the brake pressure switch and transmission disconnect mechanism had not been functioning and that the damage could have occurred without Brown's knowledge." (Brief, p. 50, citing JA 108) However, a review of Groweg's testimony establishes that these later findings still do nothing to harm Midwest's reasonable good faith belief that Brown was at fault, whether intentionally or unintentionally.

Groweg's belief that Brown may have caused the damage unintentionally changes nothing. Midwest is not required to establish that Brown intentionally damaged the end loader nor did Midwest terminate Joe Victorian Sr. because he intentionally damaged company property/equipment. This does not change the fact that operator error caused the damage.

Second, Groweg testified that despite the fact that the brake pressure switch was broken, he is unclear as to whether the switch would even notify the end loader operator that something was amiss. (2SA 1-2) Third, Groweg testified that even if the transmission disconnect was not working, Brown would have (or should

have) known by the sound the engine would make when pushing on the pedal and raising the loader. (JA 529-530) Lastly, Groweg testified that Brown *should have been aware* of the damage he was causing to the brakes.

3. The Board disregarded Brown's 2012 disciplines

The Board disregarded the 2012 disciplines issued to Brown for equipment damage. Consequently, no deference is warranted to the Board's findings and conclusions. See, *DHL Express v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) (no deference warranted where the Board fails to sufficiently articulate its reasoning or where the Board leaves "critical gaps in its reasoning.") The Board argued that the ALJ did acknowledge Brown's prior discipline. (Brief, p. 48, citing JA 103-104, n. 26). However, footnote 26 only references an undocumented 2007/2008 incident wherein Midwest alleged that Brown had nearly burned up the brakes on and end loader. Footnote 26 makes no reference to the 2012 disciplines issued to Brown for equipment/property damage.

4. The Board overstates Vern Jones's suggestion to Groweg to include operator error in his inspection report

The Board makes too much of Jones's suggestion to include operator error in his initial report. First Groweg testified that based on his initial inspection, he did in fact believe that operator error was the cause of the damage. Groweg testified that everything in his report was true and accurate. (JA 1340-1341 & 1348) Accordingly, Jones did not suggest that Groweg include anything that was

not truthful or inaccurate. Even in his affidavit to the Board Agent, Groweg stated that he explained how the operator may have caused the damage. (JA 553) Based upon this information, it is certainly telling why the Board decided not to call Groweg as witness.

Second, the Board put forth zero evidence that Jones was an agent or supervisor for Midwest, nor did they elicit any testimony even suggesting that anyone in management instructed Jones to influence Groweg's inspection in anyway. The Board's fixation on Jones is a baseless attempt to discredit Groweg's report and Midwest's valid, reasonable good faith belief that Brown caused the damage to the end loader.

5. Midwest's investigation was proper

Leach is an experienced end loader operator and was certified by the Ohio Department of Transportation. (2SA 3-4) As such, Leach is able to tell when an end loader's brakes are damaged and/or are burning up. Notwithstanding, Leach used an unbiased third party report in lieu of a Company incident report so he would not be accused of discriminating against Brown. (JA 697-698, 724)

Notwithstanding, prior to terminating Brown, Leach did speak with Brown, inquired what happened to the end loader, and asked Brown to provide a written statement. (JA 691, 717, 721) During this conversation Brown alleged he did nothing wrong to the end loader and attempted to place blame on Leiby, the union

member who operated the loader in the shift immediately before Brown. (Id.) Consequently, Leach then spoke to Leiby. (JA 694-696, 717, 722) Leiby informed Leach that he did not encounter any problems with the end loader. (Id.) Leiby did not report any issues to management before, during or after his shift (which was immediately prior to Brown's shift.) (JA 693) Leach only spoke with Brown and Leiby because they were the only individuals who had operated the end loader in the 24 hours prior to the damage. (JA 696) Further, Brown had over four days to provide a written statement but, nevertheless, failed to do so. (JA 691, 717, 721) Thus, Leach decided to terminate Brown after he talked to Brown and Leiby, after he viewed the end loader and after he had an opportunity to review the findings in Groweg's Report, (JA 1135). (JA 697-698, 723)

The ALJ discredited Midwest's investigation based upon his "finding" that Midwest terminated Joe Victorian, Sr. only after Leach interviewed Joe Victorian, Sr. and other witnesses to the accident. As noted in its initial Brief (p. 34), the ALJ's finding is patently false. Prior to terminating Joe Victorian, Sr., Leach obtained only Joe Victorian, Sr.'s witness statement. The ALJ's finding is arbitrary and is unequivocally not supported by the record evidence. Remarkably, the Board's response to the ALJ's fabricated finding is that "[it] is of no moment." (Brief, p. 47, FN 12.) Contrary to the Board's efforts to not let the facts get in the way of its findings and conclusions, Midwest maintains that the ALJ's untruthful

finding is quite the opposite of "it is of no moment." Especially given the ALJ used these concocted facts to incorrectly discredit Midwest's investigation. In direct contradiction to the evidence, the ALJ concluded:

> The conclusion that the Respondent has failed to show that Leach would have terminated Brown if not for Brown's protected activity is buttressed by other aspects of how Leach handled his inquiry about the damage. In the case of J. Victorian, Leach imposed the harsh discharge penalty only after he obtained J. Victorian's statement and interviewed witnesses to the accident. That stands in stark contrast to the way Leach handled the investigation regarding Brown's responsibility for the damage to 3-Kawasaki. Leach discharged Brown without obtaining his statement, even though Brown had offered to meet and give a statement. . . . In addition, Leach decided to terminate Brown without interviewing Fussell – the one witness who had been working with Brown throughout the relevant shift and who was in the best position of anyone other than Brown himself to observe whether Brown was riding the brakes during the shift and whether there were any burning smells that should have alerted Brown to a problem.

(JA 107-108)

Based upon all of the above, the totality of the record evidence, the ALJ's findings and conclusions regarding his determination that Midwest discriminatorily terminated Brown in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act is irrational, arbitrary and not substantially supported by the record evidence. In the alternative, the Board's Order requiring reinstatement for Brown should be modified pursuant to this Court's ruling in *Frazier Indus. Co. v. NLRB*, 213 F.3d 750 (D.C. 2000) and the case law cited by the Board in its Brief does not alter this Court's conclusion in *Frazier*. (Brief, p. 52)

B. Midwest Did Not Violate Section 8(a)(1) and (5) of the Act When Using The Teamsters to Transport Aluminum Cargo From the Wet Side to the Dry Side of the Facility

In its 10(k) decision the Board concluded as follows:

> As to the work of transporting cargo from the wet side over to the dry side, currently being performed by the trucking company, we award the work to the Teamsters-represented employees because they are capable of performing this work and did so before the Employer contracted with the trucking company in 2007.
>
> **********
>
> DETERMINATION OF DISPUTE
>
> The National Labor Relations Board makes the following Determination of Dispute.
>
> 1. Employees of Midwest Terminals of Toledo International, Inc., who are represented by International Longshoremen's Association, Local 1982, are entitled to perform, in a manner consistent with past practice, all loading, unloading, and movement of cargo and materials on the west/wet side of St. Lawrence Drive at the Employer's facility located at 3518 St. Lawrence Drive, Toledo, Ohio, including the loading of any trucks used to transfer cargo and materials across St. Lawrence Drive, **subject to the proviso set forth below**...[.] Employees of the same Company, who are represented by Teamsters Local 20, are entitled to perform the loading, unloading and movement of cargo and materials on the east/dry side of St. Lawrence Drive at the Company's facility, **provided, that these employees are also entitled to enter the west/wet side of the facility in order to transport cargo that is to be transferred from the wet side to the dry side across St. Lawrence Drive.**

(JA 979-980) (Emphasis added). The main contention between the parties is the meaning of the proviso. The Board maintains that transfer trucks must still be used, but can be driven by the Teamsters. Conversely, Midwest maintains that the

Teamsters are permitted to use their forklifts to transport the aluminum (or any other cargo that can be transported via forklift) which eliminates the cumulative and inefficient practice of needlessly loading and unloading transfer trucks. If the transporting of cargo does require the use of a transfer truck, i.e., calcium, then the union, consistent with past practice, continues to load the cargo onto the transfer truck.

Midwest asserts that its position is the most logical reading of the proviso given the testimony regarding the inefficiency and significant cost of the use of transfer trucks in addition to the amended stipulation that the work in dispute was the loading, unloading and movement of cargo and materials at the entire facility. Rather than award all of the work in dispute to the Teamsters, the Board only allowed for the Teamsters to come to the water side and transport any cargo that is to be stored on the dry side. Further, the Board acknowledged in its 10(k) Decision that the record evidence established that the "Teamsters represented employees spend working time waiting idly for a third party trucking contractor to transport cargo loaded onto trucks on the wet side over to the dry side[.]" (JA 978) Having a single Teamster represented employee drive a transport truck does not eliminate the inefficient and unnecessary task of loading and loading a transfer truck nor does it rectify the remaining Teamster represented employees spending working

time waiting idly for a Teamster driven truck to transport cargo loaded onto trucks on the wet side to the dry side.

1. The record from the jurisdictional dispute should have been made part of the record herein

The ALJ improperly allowed the union to re-litigate the jurisdictional dispute in this matter. The ALJ did so without the presence of the Teamsters as a party participant and he based his decision not on the record evidence presented during the 10(k) hearing, but on the record evidence submitted by the General Counsel in this matter.

2. The Board should have allowed Teamsters Business Agent Martin Jay to testify

Martin Jay testified that while there was generally a division of work regarding the dry side versus the wet side, there were instances wherein Teamsters traveled to the wet side of the dock and transported cargo back to the dry side of the facility. Before he could answer the method used by the Teamsters to transport the cargo back to the dry side, the General Counsel objected on the basis of hearsay and the ALJ sustained the objection. Midwest then attempted to introduce Jay's Board affidavit into evidence and the General Counsel again objected on the basis of hearsay and the ALJ sustained the objection.

The ALJ's ruling was improper and prejudicial to Midwest and in direct contradiction to the Board's own precedent regarding the admission of hearsay set

forth in *Conley Trucking*, 349 NLRB 308 (2007). In *Conley Trucking*, the Board discussed its general willingness to admit hearsay testimony that is otherwise corroborated and probative. Id. at 310. Additionally, the Board noted as follows:

> [i]f sworn statements to the Board agent are regarded as depositions, they are not hearsay under the Federal Rules. And there is good reason to treat them as such because there is no requirement under the Federal Rules that the prior statement embodied in a deposition be subject to cross-examination when made. If the sworn statements are not deemed to be depositions, the distinction is indeed a fine one entitled to little consideration in an administrative proceeding where there is discretion to receive in evidence and rely on hearsay as substantive evidence.

Id., citing *Alvin J. Bart and Co., Inc.,* 426 NLRB 242, 243 (1978). Jay was subpoenaed by Region 8 to give his testimony in an affidavit and he was under oath. Based on all of the above, the ALJ should have permitted Jay to testify and admitted his Board affidavit into evidence. See, *Wheeler v. NLRB*, 314 F.2d 260 (D.C. Cir. 1963) (Employer denied due process where its proffered evidence was excluded, it was denied cross-examination of certain witnesses and its rebuttal evidence was excluded.)

This Court can be sure that if Jay' testimony were beneficial to the General Counsel, his testimony would have been permitted, hearsay notwithstanding. Jay's proffered testimony further established that prior to the 10(k) hearing, Teamsters represented employees did indeed travel to the wet side of the dock on their forklifts and transport cargo back to the warehouse on the dry side of the facility.

The Board's assertion that the prohibition of Jay's testimony was not prejudicial to Midwest is not credible.

Additionally, the Board's reliance on *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160 (D.C. Cir. 2004) and *Salem Hospital Corp. v. NLRB*, 808 F.3d 59 D.C. Cir. 2015) is unjustified. In *Exxon Chem.*, this Court concluded that ALJ correctly excluded evidence related to Exxon's claims that the grievances were untimely as well as its claims for waiver and estoppel because these were procedural questions for the arbitrator to resolve. Id. at 1166. *Salem Hospital* dealt with a representation hearing and the Courts "significant deference" accorded to the Board as to the determination of appropriate units. Id. at 67. Further, as this Court found, "because Salem failed either to make a proffer or to provide any other specific evidence of potential witnesses' testimony, we cannot determine that the excluded evidence was either relevant or material." Id. at 70. Midwest made a proffer establishing Jay's testimony was both relevant and material.

C. Midwest did not violate Section 8(a)(1) and (5) of the Act when it stored calcium in warehouses on the dry side of the facility

The dispute about calcium is not an elimination of work dispute. Rather, it is a dispute about the storage of cargo, specifically calcium. The parties do not bargain over where cargo is to be stored. This is a customer and management decision. (JA 656-659). The Board put forth no evidence which would establish that the union has ever had any influence or say-so regarding which side of the

facility or in which warehouse cargo is to be stored. That being said, both union and Company witnesses acknowledged that the largest shed on the water side of the facility which was often used to stored calcium was no longer in existence during the time period in question. (JA 212-213, 452-453 & 650)

Generally speaking, the union represents those workers performing stevedoring services; loading and offloading of vessels, including warehousing services, on the water side. (JA 659-662) Teamsters represents those employees who perform warehousing services on the dry side. (JA 659-653) With respect to the calcium, the division of work remained unchanged. Even though the division of work remained unchanged, the Board concluded that the Midwest violated § 8(a)(5) and (1) of the Act because after the union off loaded the calcium from the barge and placed it on transfer trucks, the transfer trucks moved the cargo to the dry side warehouses to be off loaded by the Teamsters as opposed to water side warehouse to be off loaded by the union. (JA 86) With respect to cargo that is to be stored on the dry side of the dock, Midwest did not eliminate any of the union's work.

Transfer trucks must be used for transport of calcium because the forks of the forklifts could puncture the bags. (JA 712) So, in this instance, Midwest followed the Board's interpretation of the 10(k) decision that it seeks to implement with respect to aluminum. Accordingly, no violation of the Act has occurred. In

response, the Board maintains that the Board's 10(k) decision is limited to aluminum and is unrelated to any purported unilateral change to calcium. (Brief, p. 41, FN 10.) However, the parties stipulated that the work in dispute is the ***loading, unloading, and movement of cargo and materials*** at the Employer's facility located at 3815 St. Lawrence Drive, in Toledo, Ohio. (JA 976) (Emphasis added.) The decision is applicable to all cargo, including calcium.

Based on all of the above, the ALJ's decision is irrational, arbitrary and not substantially supported by the record evidence. Rather, the record evidence establishes Midwest generally maintains a division of warehouse work – the union on the water side and Teamsters on the dry side. Notwithstanding, the ALJ is now attempting to legislate the specific terms and conditions of the warehouse work, including which cargo can be permissibly stored in each particular warehouse. The ALJ's determination that Midwest is required to bargain over which particular warehouse certain cargo is to be stored is irrational and would result in a bargaining quagmire. See, *Welsh Co.*, 149 NLRB 415, 419 (1964). "[Work] assignments [are] matters peculiarly within the prerogative of management, and its reasonable business decision is of no legitimate concern either of the Board or the courts." The storage of cargo is no different.

D. Midwest Did Not Unilaterally Change Its Informal Crane Training Procedures

Midwest did not waive its affirmative defense of waiver set forth in § 10(b), 29 U.S.C. § 160(b). Midwest noted in its initial Brief that he union's own witnesses (Baker, Jr. and Joseph) admitted that the March 2011 letter from the Port Authority (JA 1048) prohibited seat time for crane trainees until after they have become qualified/certified. Baker, Jr. testified that the March, 8, 2011 letter from the Port Authority prohibits people from operating cranes until they receive the proper NCCCO Certification. (JA 257-258.) Similarly, Joseph testified as follows: (1) "Seat time" means once an employee goes through classes they would then be allowed seat time during their training/probationary period (JA 314); and (2) Employees go to class, become certified and then are allowed seat time/training. (JA 317) Accordingly, Midwest did present this change to the union (as far back 2010) as one that could be bargained over, but union chose not to. Further, the three union members (Brown, Randy Baumert and Kevin Newcomer) who were allowed seat time in the new Leibherr cranes prior to 2013 were already qualified crane operators – a stark contrast from crane trainee employees who had never set foot in a crane.

1. The Board should have adopted the findings and conclusions set forth in Member Miscimarra's dissent

Member Miscimarra dissents from the majority on three separate grounds. First, similar to Midwest's argument, Member Miscimarra maintains that if any unilateral change would take place with respect to Leibherr crane NCCCO certification and informal "seat time," the issues were raised in advance with the union and, at most, the union merely protested the change, which is not equivalent to a request to bargain. (JA 80, citing *Ohio Edison Co.; First Energy Corp. v. NLRB*, 847 F.3d 806 (6th Cir. 2017) (enforcement denied where mere protest did not meet the requisite obligation to request bargaining) Member Miscimarra further stated:

> I believe the record contradicts my colleagues' conclusion that the Union requested bargaining. Here, the majority relies on Union President Brown's testimony to the effect that he suggested the parties could further discuss "seat time." Yet, the evidence precludes any finding that this constituted a "request" for bargaining. To the contrary, the facts reveal that the parties, through Brown and Leach, had *already* discussed the sequence of the NCCCO certification training and seat time, and Leach made clear that the NCCCO training must come first for prospective new trainees lacking prior Liebherr crane experience. Brown never requested bargaining over this issue. At most, this testimony suggests that Brown merely persisted in the position he had staked out previously regarding this issue; Brown continued to argue for seat time to precede NCCCO training. See *Ohio Edison v. NLRB*, 847 F.3d at 810 ("[T]o protest is to seek change by expressing disapproval; to request bargaining, in contrast, is to seek change by signaling a willingness to offer something in return.")

Id. (Emphasis in original.)

Second, the record indicates there was no past practice regarding training on the new Liebherr cranes which were owned by the Toledo-Lucas County Port Authority. Id. Accordingly, there could be no unilateral change with respect to formal NCCCO formal training and informal "seat time." (Id) Member Miscimarra concluded as follows:

> [Midwest] asked the Union to suggest two employees who could take the course associated with NCCCO training. The record establishes that, after the Union chose not to identify anyone in the bargaining unit who would participate in the NCCCO training without first receiving informal "seat time" training, the Respondent never moved forward with *any* changes or additional training—formal or informal—for employees regarding operation of the Liebherr cranes. Without the actual implementation of a unilateral change, the Board cannot reasonably find that the Respondent engaged in unilateral actions that violated Section 8(a)(5). See *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) ("[W]here an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1).") (citing *House of the Good Samaritan*, 268 NLRB 236, 237 (1983)). See generally *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that a "unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate").

(JA 80-81)

Lastly, Member Miscimarra asserts that because the issue of seat time with respect to the new Liebherr cranes remains unresolved, the Board is prohibited by statute from making a binding resolution upon the parties. (JA 81). Specifically, Member Miscimarra states:

> [T]he Board's lack of authority is explicit in our statute: Section 8(a)(5) makes it unlawful for an employer to engage in a refusal to

> bargain collectively, and Section 8(d)—which defines the phrase "bargain collectively"—states the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." See also *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 102, 108 (1970) ("[W]hile the Board does have power under the National Labor Relations Act . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement. . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.")

(Id.)

2. Midwest did not waive the remainder of its arguments

The Board maintains that Midwest waived all arguments wherein it incorporated arguments from its Brief before the Board. Midwest had no other option at its disposal to reserve its right on appeal. Pursuant FRAP 32(a)(7) and D.C. Cir. R. 32(e) this Court's word limit is 13,000 words. Midwest's brief was just under 12,900 words. Midwest filed a Motion with this Court in (18-1017 & 18-1049) seeking to exceed the word limit noting that complying with FRAP 28(a)(6) alone would consume a significant portion of the allotted 13,000 words. Given the significant amount of issues for review, Midwest knew in advance and tried to alert the Court that it could not present its challenges within the word limits. The Court denied Midwest's motion. Frankly, Midwest did not file a similar motion in this case because based upon the Court's earlier ruling, Midwest,

right or wrong, deemed a similar request fruitless and did not want to needlessly expend this Court's resources and further increase Midwest's legal expenses. Accordingly, Midwest respectfully seeks this court's permission to address its remaining arguments during oral argument.

E. Sections 8(a)(3) and (1), 8(a)(4) and (1) & 8(a)(1) Allegations Involving Prentis Hubbard

The Board maintains that Midwest waived all arguments wherein it incorporated arguments from its Brief before the Board. For the same reasons noted immediately above, Midwest respectfully seeks this court's permission to address these arguments in a supplemental brief or during oral argument.

II. CONCLUSION

For all the reasons outlined above, Midwest respectfully requests that this Court grant its Petition for review and Deny the NLRB's cross-application for enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief 6,470 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been was filed on this 29th day of August, 2018. Notice of this filing will be sent via the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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